

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

WILLIAM BARNES, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
THE AMERICAN TOBACCO COMPANY,	:	
INC., et al.	:	NO. 96-5903
 Newcomer, J.		 October , 1997

M E M O R A N D U M

Presently before this Court are Defendants' Motion for Certification of Class Certification Order of August 22, 1997, for Interlocutory Appeal and for a Stay of Proceedings Pursuant to 28 U.S.C. § 1292(b) or, in the Alternative, for Reconsideration of the August 22, 1997 Order, and plaintiffs' response thereto, and defendants' reply thereto. For the following reasons, the Court will deny defendants' Motion. Pursuant to Federal Rule of Civil Procedure 23(c)(1), the Court will decertify the class that had been previously certified by Order dated August 22, 1997, it appearing that this action cannot proceed on a class-wide basis.

I. Introduction

By Memorandum and Order dated August 22, 1997, this Court certified this case as a class action, pursuant to Federal Rule of Civil Procedure 23(b)(2), against thirteen defendants,¹ wherein

¹The defendants are The American Tobacco Company, Inc., R.J. Reynolds Tobacco Company, RJR Nabisco, Inc., Brown & Williamson Tobacco Corporation, Philip Morris, Inc., Philip Morris Companies, Inc., Lorillard Tobacco Company, Inc., Lorillard, Inc., United States Tobacco Company, The Tobacco Institute, Inc., The Council for Tobacco Research-U.S.A., Inc., Liggett Group, Inc., Liggett & Myers, Inc. and Brooke Group, Ltd. Pursuant to the respective parties' stipulations, American Brands, Inc., Batus, Inc., Batus Holdings, Inc., Loews Corporation and UST, Inc. have been dismissed from this action without prejudice. In

named plaintiffs² seek the establishment of a medical monitoring program on behalf of over one million class members. Because named plaintiffs satisfied the threshold requirements of Rule 23(a)(1)-(4) and the requirements of Rule 23(b)(2), this Court certified the following class:

All current residents of Pennsylvania who are cigarette smokers as of December 1, 1996, and who began smoking before age 19, while they were residents of Pennsylvania.

In the August 22, 1997 Order, this Court explained that the issue of class certification was a "close question." Specifically, the Court explained:

Because a court may amend an order granting class certification, Asbestos Litigation, 789 F.2d at 1011, in a close case the court should rule in favor of class certification. Kahan, 424 F.2d at 169. Thus, even though this case may present a close question as to whether this action should be certified under Rule 23(b)(2), the Court will grant certification because the Court may amend the certification order before a decision on the merits, if it becomes obvious after resolution of the parties' dispositive motions that too many individual issues are implicated by the facts of this case.

Barnes v. American Tobacco Co., No. CIV.A.96-5903, 1997 WL 550650, at *15 (E.D. Pa. Aug. 22, 1997). Even though the Court concluded that class certification presented a close question, the class was certified because, on the record before the Court at the time, plaintiffs had satisfied requirements of Rule 23.

addition, B.A.T. Industries p.l.c. was dismissed for lack of personal jurisdiction.

²The plaintiffs named in the Second Amended Complaint are William Barnes, Ciaran McNally, Catherine Potts, Norma Rodweller, Barbara Salzman and Edwark J. Slivak. Steven Arch was granted leave to withdraw from this action and his claims were dismissed without prejudice.

Defendants presently move for certification of this Court's August 22, 1997 Order for interlocutory appeal and for a stay of proceedings pursuant to 28 U.S.C. § 1292(b) or, in the alternative, for reconsideration of the August 22, 1997 Order. Defendants contend that immediate interlocutory appeal is warranted in this case because the August 22, 1997 Order involves (1) a controlling question of law as to which there is a substantial ground for difference in opinion and (2) immediate appeal would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

Defendants contend that this case involves several controlling questions of law as to which there is a substantial difference of opinion: (1) Did the Court, contrary to Georgine v. Amchen Products, Inc., 83 F.3d 610 (3d Cir. 1996) and other well-established precedents, certify a class without due consideration of the individual issue that pervade the case?; (2) Did the Court improperly interpret Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 2152-53, 40 L. Ed. 2d 732 (1974) and impermissibly shift the burden of proof on class certification requirements to defendants?; (3) Did the Court's Eisen analysis and burden shifting result in the improper certification of this class action?; (4) Did the Court err in certifying an immature tort for class certification?

Defendants also maintain that interlocutory review of these questions will materially advance this litigation. Defendants claim that this Court and the parties presently face the

daunting task of litigating dozens of issues implicating decades of conduct by at least six cigarette manufacturers and other defendants concerning hundreds of products. See Arch v. American Tobacco Co., Inc., No. CIV.A.96-5903, 1997 WL 312112, at *17 (E.D. Pa. June 3, 1997). If the Court has erred in certifying this class action, defendants argue that much time, effort and expense will be wasted before an appeal can be taken after final judgment. Defendants, thus, submit that interlocutory review will materially advance this litigation.

In their motion for reconsideration, defendants merely incorporate the same arguments that they advance in their motion for interlocutory appeal. Plaintiffs, of course, have filed a response, in which they claim that neither the motion for interlocutory appeal nor the motion for reconsideration should be granted. Plaintiffs argue that there simply exists no controlling question of law, only a difference of opinion. Further, plaintiffs submit that interlocutory review in this case will not materially advance this litigation in light of the fact that trial is only a few weeks away. With respect to the reconsideration motion, plaintiffs argue that such motion should be denied because defendants have not raised any grounds which are cognizable in a motion to reconsider.

The Court will address these issues below. In addition to disposing of defendants' motions, the Court will also consider, pursuant to Fed. R. Civ. P. 23(c)(1), whether this action can proceed as a class action in light of the evidentiary record and

the issues which are now before the Court.

II. Discussion

The Court will first address whether the August 22, 1997 Order should be certified for interlocutory appeal or whether defendants' alternative motion for reconsideration should be granted. The Court will then consider whether this case can proceed as a class action in light of individual issues that have been implicated by the evidentiary record presently before the Court.

A. Interlocutory Appeal

Interlocutory review is only warranted under exceptional circumstances. Appellate review of a district court order is restricted to final decisions to prevent "the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequences, but a single controversy." Eisen, 417 U.S. at 170. The policy is clearly against punctuating ongoing litigation with serial appeals. United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1982).

Interim review of class certification orders is even less appropriate, given the discretionary and conditional nature of Rule 23 decisions. For this reason, the Third Circuit has held that the district court's determination to permit a class action does not itself present a controlling question of law. Link v. Mercedes-Benz of North Am., Inc., 550 F.2d 860, 862 (3d Cir. 1977). Instead, the Third Circuit requires "special factors which take it outside the ambit of the general rule." Id. (quoting Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir. 1974)). Accordingly,

under § 1292(b), certification of orders granting class certification "is appropriate only in 'exceptional' cases." Piazza v. Major League Baseball, 836 F. Supp. 269, 270 (E.D. Pa. 1993).

Not only must defendants prove that they are entitled to interlocutory review in light these principles, defendants must show the following: (1) the existence of a controlling question of law with respect to which there are substantial grounds for difference of opinion, and (2) that an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b); see also Katz, 469 F.2d at 755. The defendants, here, cannot meet their burden under § 1292(b).

Where the purported "controlling question of law" is simply a question of proper exercise of discretion, the Third Circuit has held that interim review is inappropriate. See, e.g., Ungar v. Dunkin Donuts of Am., Inc., 531 F.2d 1211 (3d Cir. 1976) ("a 'controlling question' does not exists when the sole issue is whether the factual complexity of the given case meet the class action requirements of Rule 23"). Here, defendants argue that the Court's class certification order should be certified for immediate appeal pursuant to § 1292(b) because of four purported controlling questions. Notwithstanding defendants' arguments to the contrary, the Court finds that the "questions of law" which defendants enumerate are really nothing more than disagreements with the Court's application of Rule 23 to the particular facts of this case in exercising its discretion in certifying the class. In this Circuit, such disagreements do not constitute controlling issues of

law under § 1292(b) and cannot be the basis for interlocutory appeal.

Under Rule 23(b)(2), two requirements must be met before a class can be certified: (1) the requirements of Rule 23(a) must be satisfied; and (2) defendants must have acted or refused to act on grounds generally inapplicable to the class and final injunctive relief must be appropriate. Fed. R. Civ. P. 23(a), (b)(2). In Barnes (the August 22, 1997 Order), this Court found that plaintiffs had met the requirements of numerosity, commonality, typicality and adequacy. Barnes, 1997 WL 550650, at *14-15. The Court also determined in Barnes that defendants have acted or refused to act on grounds generally applicable to the class and that final injunctive relief was appropriate. Id. at *7-8. Thus, a fair review of this Court's previous Order demonstrates that this Court properly considered the relevant requirements under Rule 23.

Based on the record that was presented to the Court when it considered plaintiffs' renewed motion for class certification, the Court cannot find that it did not give "due consideration of the individual issues" that were involved in the case. A close review of the August 22, 1997 Order indicates that this Court carefully considered whether any individual issues existed on the record at that time. For example, at the time of this Court's August 22, 1997 Order, plaintiffs represented to this Court that "addiction" no longer played a role in this case to the extent that addiction would require an individual analysis. Moreover, plaintiffs pointed to certain conduct of defendants that would

preclude defendants from raising affirmative defenses. Thus, the highly individual issues of affirmative defenses were not implicated at the time of this Court's August 22, 1997 Order. In sum, the Court concludes that it properly considered the individual issues that were implicated by the record of this case at the time of entry of the August 22, 1997 Order.

The Court also finds that it did not incorrectly interpret Eisen or improperly shift the burden of proof on the class certification requirements. While defendants offer a lengthy analysis discussing the meaning of Eisen, their reading of Eisen is not supported by Eisen itself or by any subsequent Supreme Court decision addressing it; Eisen, as written, remains controlling law. In both certification decisions in this case, the Court recognized that it must look beyond the pleadings to determine whether the requirements of Rule 23 have been satisfied. Arch, 1997 WL 312112, at *14; Barnes, 1997 WL 550650, at *10. The difference between the result in Arch and the result in Barnes had nothing to do with this Court's misinterpretation of Eisen. To the contrary, in light of plaintiffs' Second Amended Complaint and the record that existed before the Court at the time of its decision, the Court simply was not convinced that individual issues existed which would preclude certification. In other words, plaintiffs had met their burden of proving the elements of Rule 23, and demonstrating that no individual issues existed.

Defendants' burden-shifting argument is similarly unavailing. Defendants essentially say that the Court has lost its

bearing in the three months that passed since the Arch decision. By focussing on "snippets" or "bits and scraps" from the Court's opinion, defendants suggest that the Court improperly shifted the burden of proof on class certification onto defendants, i.e., that there was, in effect, a presumption in favor of certification, and that defendants had to show why the class should not be certified. This Court, however, engaged in no such activity.

In Barnes, the Court found that plaintiffs had met their burden, and that defendants had failed to rebut plaintiffs' showing regarding common issues and class-wide proof. The Court, in Barnes, first determined that plaintiffs had met the requirements of Rule 23. The Court then turned to defendants' argument that many individual issues existed that would preclude certification. At this point in the Court's analysis, the Court did not require defendants to prove that these individual issues existed. Rather, a close review of Barnes demonstrates that the Court independently reviewed the record and simply concluded that individual issues would not preclude certification. If the Court used language in its opinion that made it appear as though it was requiring defendants to show that no individual issues existed, such language is directly contradicted by the Court's actual analysis. Accordingly, defendants' burden-shifting argument is in itself erroneous and provides no basis for interlocutory appeal.³

³The Court also rejects defendants' argument that this Court erred in certifying an immature tort for class treatment. The immature tort doctrine is a doctrine which has been used to assess whether the superiority and/or predominance prongs of Rule

Finally, defendants cannot establish, as they must, that an interlocutory appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Courts within the Third Circuit have routinely held that where a case is ready for trial, an interlocutory appeal will only result in delay. See Piazza, 836 F. Supp. at 271. For instance, in Piazza, the court reached this conclusion where trial was to begin in less than five weeks. Here, where the trial is scheduled to begin in less than two weeks, the conclusion is self-evident.

Defendants have not satisfied § 1292(b)'s applicable standards. Defendants have failed to show how the Court's decision in Barnes is anything other than an appropriate exercise of discretion under Rule 23(b)(2) that comports with precedent. Second, with trial on the immediate horizon, the most expeditious course is to proceed forward, reserving all appeals for resolution thereafter. Interlocutory review will only result in substantial delay.

Because defendants have not established their right to interlocutory appeal, the Court will deny their motion seeking such relief. Having disposed of this issue, the Court will now address defendants' motion for reconsideration.

23(b)(3) have been satisfied; thus the immature tort theory is necessarily tied to Rule 23(b)(3). The immature tort doctrine simply is not applicable to this Court's Rule 23(b)(2) analysis; indeed, defendants did not raise the immature tort doctrine in the Rule 23(b)(2) context until the filing of this instant motion. To the extent that it may be applicable, the Court finds that the "immature" nature of plaintiffs' medical monitoring claim would not preclude certification.

B. Motion for Reconsideration

The purpose of a motion for reconsideration, as is often stated, is to correct manifest errors of law or fact or to present newly discovered evidence. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Reconsideration is granted only if defendants can demonstrate one of three grounds: (1) the availability of new evidence; (2) an intervening change in controlling law; or (3) the need to correct a clear error of law. Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994).

In the Third Circuit, a motion for reconsideration, even where purportedly grounded on the court's commission of clear error, is not to be used merely as an opportunity to reargue issues that the court has already analyzed and determined. Waye v. First Citizen's National Bank, 846 F. Supp. 310, 314 (M.D. Pa. 1994). "[A] motion for reconsideration addresses only factual and legal matters that the Court may have overlooked It is improper on a motion for reconsideration to 'ask the Court to rethink what [it] had already thought through — rightly or wrongly.'" Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993) (citation omitted).

Applying this standard here, the Court finds that defendants are not entitled to reconsideration. As stated in Part II.A., defendants have failed to establish that this Court committed a manifest error of law in Barnes. In addition, defendants have not presented this Court with newly discovered evidence that would justify that this Court reconsider its August

22, 1997 Order. At its core, defendants' motion for reconsideration simply expresses defendants' disagreement with this Court's August 22, 1997 Order, and asks the Court to reconsider what it has already considered in its previous Order. As defendants are aware, a motion cannot be used to reargue issues which have already been presented and rejected.

Because defendants do not advance arguments which are cognizable in a reconsideration context, the Court must deny defendants' alternative motion for reconsideration. Having disposed of defendants' motion in its entirety, the Court now turns to the issue of whether this Court should decertify plaintiffs' class pursuant to Fed. R. Civ. P. 23(c)(1).

C. Rule 23(c)(1) Reconsideration

Federal Rule of Civil Procedure 23(c)(1) provides, in part, that: "An order under this subdivision may be conditional and may be altered or amended before the decision on the merits." Fed. R. Civ. P. 23(c)(1). Under this Rule, trial courts are permitted to decertify, in whole or in part, any class that had been previously certified if the facts before the Court require such a result. See Miera v. First Sec. Bank of Utah, N.A., 925 F.2d 1237, 1241-42 (10th Cir. 1991) (holding that a trial court may decertify a class action pursuant to Rule 23(c)(1)). Indeed, district courts are required to reassess their class rulings regularly as the case develops. Kuehner v. Heckler, 778 F.2d 152, 163 (3d Cir. 1985); Richardson v. Byrd, 709 F.2d 1016, 1019 (5th Cir. 1983).

The Fifth Circuit has succinctly articulated the

obligations of a district court under Rule 23:

Under Rule 23 the district court is charged with the duty of monitoring its class decisions in the light of the evidentiary development of the case. The district judge must define, redefine, subclass and decertify as appropriate in response to the progression of the case from assertion to facts. We recognize that these complex cases cannot be run from the tower of the appellate court given its distinct institutional role and that is has before it printed words rather than people.

Id. Federal district courts must constantly monitor the progress of the class action cases before them; it is our obligation and duty. A trial court must define, redefine, subclass and decertify the class action before it when the evidentiary development of a case requires such action. In this regard, the Court finds that, in light of the evidentiary development of the instant case, this Court must decertify the class which had been previously certified in this action.

By Memorandum and Order dated August 22, 1997, this Court certified a class in this action, pursuant to Federal Rule of Civil Procedure 23(b)(2), against thirteen defendants, wherein named plaintiffs seek the establishment of a medical monitoring program on behalf of over one million class members. The Court, however, explained that the issue of class certification was a "close question." Specifically, the Court explained:

Because a court may amend an order granting class certification, Asbestos Litigation, 789 F.2d at 1011, in a close case the court should rule in favor of class certification. Kahan, 424 F.2d at 169. Thus, even though this case may present a close question as to whether this action should be certified under Rule 23(b)(2), the Court will grant certification because the Court may amend the certification order before a decision on the merits, if it becomes obvious after resolution of the parties' dispositive

motions that too many individual issues are implicated by the facts of this case.

Barnes, 1997 WL 550650, at *15. Thus, in the August 22, 1997 Order, the Court specifically noted that it would eventually be required to revisit the certification issue at a later stage. Although the Court originally intended not to revisit this issue until after disposing of defendants' summary judgment motions, in light of the evidentiary record which has been produced at the summary judgment stage, the Court need not wait any longer to decide whether this action can continue on a class-wide basis.

Indeed, reviewing the evidentiary record that is now before the Court, it is obvious that this action implicates far too many individual issues to proceed on a class-wide basis. Although this action has been certified under Rule 23(b)(2), it is well-established that a district court must still determine whether individual issues and manageability problems preclude certification. In Barnes, this Court, in great detail, explained the relationship between individual issues and Rule 23(b)(2) certification:

. . . In Wetzel, the Third Circuit emphasized that the essential characteristic of a 23(b)(2) class is that it is "cohesive as to those claims tried in the class action." Wetzel, 508 F.2d at 248. "This homogeneity requirement is a natural consequence of the (b)(2) condition that the defendant 'has acted or refused to act on grounds generally applicable to the class'" Santiago v. City of Philadelphia, 72 F.R.D. 619, 627 (E.D. Pa. 1976). Thus, when a court determines whether the defendant "has acted or refused to act on grounds generally applicable to the class," the court is perforce examining whether the class is cohesive in nature. It is because of the cohesive or homogeneous nature of a (b)(2) class that "Rule 23(c)(3) contemplates that all members of the class will be bound." Wetzel, 508 F.2d at 249

(citation omitted). "Any resultant unfairness to the members of a [(b)(2)] class is thought to be outweighed by the purposes behind class actions: eliminating the possibility of repetitious litigation and providing small claimants with a means of obtaining redress for claims too small to justify individual litigation." Id.

To ensure that (b)(2) classes are cohesive in nature, the Third Circuit has explicitly "committed to the district court the discretion to deny certification in Rule 23(b)(2) cases in the presence of 'disparate factual circumstances.'" Geraghty v. United States Parole Commission, 719 F.2d 1199, 1205 (3d Cir. 1983) (citing Carter v. Butz, 479 F.2d 1084, 1089 (3d Cir. 1973)). In Santiago, the court held that "court[s] should be more hesitant in accepting a (b)(2) suit which contains significant individual issues than it would under subsection 23(b)(3)." Santiago, 72 F.R.D. at 628; see also Society for Individual Rights, Inc. v. Hampton, 528 F.2d 905, 906, aff'd in part, 528 F.2d 905 (9th Cir. 1975); Rice v. City of Philadelphia, 66 F.R.D. 17, 20 (E.D. Pa. 1974) (holding that a case should not proceed as a (b)(2) action where "virtually all of the issues would have to be litigated individually in order to determine whether a particular alleged class member was entitled to any damages at all").

The Santiago court identified two reasons as to why courts must necessarily determine whether a putative (b)(2) class action implicates individual issues. First, the court noted that in a (b)(2) action, unnamed members, who are bound by the action without the opportunity to withdraw, "with valid individual claims may be prejudiced by a negative decision on the class action." Thus, the court must ensure that significant individual issues do not pervade the entire action because it would be highly unjust to bind absent class members to a negative decision where the class representatives' claims present strikingly different individual issues than the absent members. Second, the Santiago court noted that "the suit could become unmanageable and little value would be gained in proceeding as a class action . . . if significant individual issues were to arise consistently." Id.

In light of this precedent, the language of Rule 23(b)(2) itself and the purposes behind Rule 23(b)(2), this Court concludes that it is required to examine whether the proposed class herein implicates too many individual issues and manageability problems to be certified under Rule 23(b)(2). This inquiry perforce flows from Rule 23(b)(3)'s essential characteristic that a (b)(2) class is cohesive in nature, and this cohesive/homogeneity requirement is "a natural consequence of the (b)(2) condition that the defendant 'has acted or refused to act on grounds generally applicable to the class.'" Id. at 627. Indeed, as a matter of common sense, a court simply could not allow a case with significant individual issues to be certified under (b)(2). A (b)(2)

class action with many individual issues would quickly degenerate into separate and distinct mini-trials, thus defeating the original purposes for class certification.

Barnes, 1997 WL 550650, at *8-9 (footnotes omitted).

Although a case may be certified under Rule 23(b)(2), which does not contain a superiority or predominance requirement, certification under (b)(2) does not relieve a court of its obligation to determine whether the existence of individual issues precludes certification. Indeed, as noted by many courts, a (b)(2) class should actually have more cohesiveness than a (b)(3) class. In this case, too many individual issues exist which prevent this case from proceeding as a class action.

To begin, the individual issue of addiction, which plaintiffs had previously represented as playing no part in this case, is still actually part of the present case. When compelled to discuss the substantive issues in the case on defendants' motion for summary judgment, plaintiffs primarily focussed on "addiction" and purported nicotine "manipulation." (Pls.' Br. Opp'n Dfs.' Summ. J. Mots. at 1, 18-19, 29-66, 75, 139 n.38, 159). It is obvious from plaintiffs' own words that "addiction" remains a central part of their case. As was explained in Arch, whether or not an individual is addicted is a highly individualistic inquiry:

Plaintiffs' own expert Dr. Burns recognizes that the assessment of addiction is an inherently individual inquiry. (Burns Dep. at 64, 268). Based on this statement, defendants argue that class certification under these circumstances would require a mini-hearing on the merits of each individual's case to determine injury. See Forman v. Data Transfer, Inc., 164 F.R.D. 400, 403 (E.D. Pa. 1995). Importantly, the Court finds that nowhere in plaintiffs' voluminous submissions do they actually refute that addiction is an inherently individual

inquiry. Instead, plaintiffs offer a solution to this massive problem of proving addiction on an individual basis. Plaintiffs propose that once the general issue as to whether cigarettes can cause addiction is resolved, the issue as to whether each and every class member is addicted can be resolved by having them answer a questionnaire, consisting of six simple questions. Defendants rejoin that this questionnaire cannot by itself determine whether a person is nicotine dependent.

The Court finds that even if the questionnaire were used to determine nicotine dependence, defendants would be permitted to cross-examine each and every class member as to their alleged dependence. Plaintiffs admittedly acknowledge that the plan they propose would be, at most, a prima facie indication of addiction. Plaintiffs' own experts concede that addiction is necessarily an individual inquiry. To refute plaintiffs' prima facie case, defendants would be permitted to cross-examine each individual about his specific choices, decisions and behavior, and defendants would be entitled to offer expert testimony about each person's specific circumstances and diagnosis. Based on this one individual issue, class certification under Rule 23(b)(3) is not appropriate because the cross-examination of each class member in a trial would be impossible.

Arch, 1997 WL 312112, at *16 (footnotes omitted). As can be gleaned from this Court's analysis in Arch, the issue of addiction is a highly individual issue, which cannot be resolved on a class-wide basis.

Although plaintiffs had represented to this Court that they had substantially narrowed their theories of liability under the Second Amended Complaint, plaintiffs still advance the same theories that they asserted in their First Amended Complaint. Under plaintiffs' First Amended Complaint, plaintiffs asserted, among other claims, claims sounding in negligence, strict liability and intentional exposure to a hazardous substance. After plaintiffs filed their Second Amended Complaint, plaintiffs asserted only one claim – a claim for medical monitoring.

Nonetheless, instead of completely dropping their claims for negligence, strict liability and intentional exposure to a hazardous substance, plaintiffs merely inserted these theories as the underlying theories of liability for their medical monitoring. Thus, these theories, with their attendant individual issues, are still in this case.

As this Court held in Arch, these theories of liability implicate various individual issues which cannot be resolved on a class-wide basis. Indeed, this Court noted that:

To succeed on their products liability and negligence claims, plaintiffs will also have to prove "causation," which the Court finds is not capable of determination on a class-wide basis in this case. Resolution of the "general causation" question of whether cigarettes are capable of being addictive "is not common under Rule 23(a)(2)." Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 677 (N.D. Ohio 1995). Unless it is proven that cigarettes always cause or never cause addiction, "the resolution of the general causation question accomplishes nothing for any individual plaintiff." Id.; see also In re "Agent Orange" Product Liability Litigation, 818 F.2d 145, 164 (2d Cir. 1987) (the "relevant question is not whether Agent Orange has the capacity to cause harm," but rather the "highly individualistic" question of whether "it did cause harm and to whom").

As explained previously, plaintiffs do not actually refute the proposition that a finding of addiction entails an individualistic inquiry; instead, they suggest that this individualistic inquiry can be proven by a questionnaire, consisting of six questions. The use, however, of this questionnaire will not obviate the need for cross-examination by defendants as demonstrated above. If plaintiffs are unable to prove that cigarettes always cause addiction (a contention that plaintiffs do not advance), the Court is faced with the impossible reality of trying a case in which one million persons would have to be cross-examined as to causation.

Plaintiffs cannot satisfy the "causation" element of these claims by proving that all cigarettes can potentially cause the user to become addicted. This is a general causation issue. The resolution of this "general causation question" would accomplish nothing for any of the individual plaintiffs. See Kurczi, 160 F.R.D. at 677. Indeed, the jury would still be required to determine for each class member

whether he or she is addicted to cigarettes, and, if so, whether defendants (and which defendant) caused that addiction. With respect to causation, the Court finds that this issue is highly individualized and does not lend itself to Rule 23(b)(2) certification.

To establish their strict products liability claim, plaintiffs will be required to prove a defect in defendants' products. This inquiry is also highly individualized. Defendants manufactured hundreds of different types of cigarettes over the years and have even made changes within each brand. In their First Amended Complaint, plaintiffs allege that defendants' cigarettes contain numerous "hazardous substances," and that defendants have "intentionally manipulated" the levels of nicotine and "other toxic substances." (First Amended Compl. ¶¶ 10, 13). The different types of unspecified defects – which may be present in some cigarettes but not in others – make proof of a defect a non-common issue. As a result, each class member will have to establish that the type of cigarettes he or she smoked contained a defect at the time he or she smoked them. See In re American Medical Systems, 75 F.3d at 1081 (commonality not established where the plaintiffs' "claims of strict liability . . . will differ upon the model and the year it was issued"). The need to prove a defect in defendants' products raises another individual issue.

Plaintiffs claim that they can prove a common defect on a class-wide basis for all of defendants' products. Plaintiffs argue that all of defendants' products are inherently defective because they contain sufficient levels of nicotine to cause addiction and other hazardous substances. Thus, plaintiffs will attempt to establish a common defect by showing that this combination exists in all of the cigarettes sold by defendants. Nonetheless, the possibility that plaintiffs' common defect theory will fail and that the class will be splintered into various subclasses – creating manageability concerns – "weighs against a finding of predominance of common issues." Harding v. Tambrands, 165 F.R.D. 623, 630 (D. Kan. 1996) (refusing to certify strict liability class where it is possible that the plaintiffs' common defect theory could fail).

Arch, 1997 WL 312112, at *16-17 (footnotes omitted). Because plaintiffs intend to prove their medical monitoring claim by using the theories of negligence and strict liability, the individual issues which are implicated by these theories still exist, and thus preclude class certification.

Turning to the issues of affirmative defenses and statute of limitations, the Court rejects plaintiffs' argument that these defenses are not available to defendants on the record. In the Arch opinion, it was explained, in some detail, that the issues of affirmative defenses and statute of limitations perforce raise numerous individual issues. Id. at *19-20. In Barnes, plaintiffs advanced the argument that these defenses were simply not available on the record as reflected by the Second Amended Complaint. Thus, the Court found that these issues necessarily did not preclude certification. Barnes, 1997 WL 550650, at *13. However, upon review of the summary judgment record, the Court finds that defendants should not be barred from raising affirmative defenses and the statute of limitations. Although the Court reaches that conclusion now, the Court will explain its reasoning in much greater detail in a memorandum opinion disposing of defendants' summary judgment motions, which will shortly follow the issuance of this opinion.

However, for the purposes of this memorandum, it is only important to note that affirmative defenses and the statute of limitations are available to defendants. As explained in Arch, the affirmative defenses and the statute of limitations perforce raise individual issues. Arch, 1997 WL 312112, at *13-14. For example, the defense of assumption of risk requires this Court to examine whether each and every plaintiff was subjectively aware of the risk and/or danger. Id. at *13. In determining whether the statute of limitations precludes a plaintiff from suing on his claim, the

Court necessarily would have to examine when plaintiff's injury accrued, and whether plaintiff knew or should have known of the injury and its cause. This is clearly an individual issue.⁴ The individual issues that are involved in determining whether affirmative defenses and the statute of limitations apply to each and every plaintiff are staggering. These issues clearly preclude certification.

In sum, the Court finds that the individual issues implicated by the facts and circumstances of this case preclude continuing this case as a class action. When the Court looks down the road to determine how this case would be tried, it is obvious that the litigation is unmanageable as a class action and would ultimately splinter into individual issues, which would have to be tried separately.

Hence, the Court will exercise its discretionary powers under Federal Rule of Civil Procedure 23(c)(1) and will decertify the class that had been previously certified by the August 22, 1997 Order. In light of the evidentiary record that is presently before the Court, it is plain as day that this case cannot proceed as a class action.

III. Conclusion

Accordingly, for the foregoing reasons, this Court will deny defendants' motion for certification of class certification

⁴It is also noted that the facts of this case implicate the individual issues of "consent" to an intentional tort and "comparative negligence." Two more issues which require individual analysis.

Order of August 22, 1997, for interlocutory appeal and for a stay of proceedings pursuant to 28 U.S.C. § 1292(b) or, in the alternative, for reconsideration of the August 22, 1997 Order. However, pursuant to Fed. R. Civ. P. 23(c)(1), the Court will decertify the class that had been certified by Order dated August 22, 1997, it appearing that this case cannot proceed as a class action.

An appropriate Order follows.

Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM BARNES, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
THE AMERICAN TOBACCO COMPANY,	:	
INC., et al.	:	NO. 96-5903

O R D E R

AND NOW, this day of October, 1997, upon consideration of Defendants' Motion for Certification of Class Certification Order of August 22, 1997, for Interlocutory Appeal and for a Stay of Proceedings Pursuant to 28 U.S.C. § 1292(b) or, in the Alternative, for Reconsideration of the August 22, 1997 Order, and plaintiffs' response thereto, and defendants' reply thereto, it is hereby ORDERED that said Motion is DENIED. IT IS FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure 23(c)(1), the present class is DECERTIFIED and the Court's Order Dated August 22, 1997 is VACATED, it appearing that this case cannot proceed as a class action.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.